

BEFORE THE  
LAND CONSERVATION AND DEVELOPMENT COMMISSION  
OF THE STATE OF OREGON

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IN THE MATTER OF THE REVIEW OF  
THE DESIGNATION OF URBAN  
RESERVES BY METRO AND RURAL  
RESERVES BY CLACKAMAS COUNTY,  
MULTNOMAH COUNTY, AND  
WASHINGTON COUNTY

OPENING BRIEF OF CHRIS MALETIS; TOM  
MALETIS; EXIT 282A DEVELOPMENT  
COMPANY, LLC; AND LFGC, LLC ON  
REMAND FROM THE OREGON COURT OF  
APPEALS

**I. Introduction.**

Pursuant to the Land Conservation and Development Commission (“LCDC”) Scheduling Order dated September 4, 2014, Chris Maletis, Tom Maletis, Exit 282A Development Company, LLC, and LFGC, LLC (together, “Maletis”) file this Opening Brief on remand from the Court of Appeals.

For the reasons explained below, LCDC should remand the reserves matter in its entirety to Metro and the Counties of Clackamas, Multnomah, and Washington (together, the “Counties”) to address the remand issues identified by the Oregon Court of Appeals (“Court”) in the first instance.

**II. Procedural Status.**

On February 20, 2014, the Court reversed and remanded LCDC’s order acknowledging the joint designation of urban and rural reserves by Metro and the

Counties. *Barkers Five, LLC v. LCDC*, 261 Or App 259, 323 P3d 368 (2014). In its decision, the Court concluded that LCDC erred in the following four respects:

- Approving Washington County's misapplication of the rural reserve factors for agricultural lands;
- Determining that Multnomah County had properly "considered" the rural reserve factors for Area 9D;
- Failing to explain how the Stafford urban reserve designation was supported by substantial evidence, in light of the extensive countervailing evidence in the record; and
- Affirming a decision with inadequate findings on the grounds that there was evidence in the record that "clearly supports" the local decision.

*Barkers Five, LLC*, 261 Or App at 265. To address these issues, the Court expressly directed LCDC to remand the matter to Metro and the Counties. *Barkers Five, LLC*, 261 Or App at 333, 363-364.

On April 1, 2014, Governor Kitzhaber signed House Bill ("HB") 4078, which, among other things, re-mapped the location of reserve lands in Washington County and legislatively "acknowledged" the re-mapped reserves. HB 4078 took effect immediately upon its signing.

On July 30, 2014, the Court entered the appellate judgment in this matter.

On August 25, 2014, LCDC entered a Scheduling Order authorizing the parties to brief LCDC on any and all issues pursuant to a defined schedule.

### III. Statement of Standing.

Maletis has actively participated in the reserves designation process since it began in 2009 and has made submittals to Clackamas County (September 8, 2009 and April 21, 2010), Metro (May 20, 2010), and DLCDC (July 14, 2010 and June 2, 2011). Further, Maletis was a petitioner to the Court of Appeals in *Barkers Five, LLC*.

Maletis will be adversely affected by LCDC's decision because Maletis owns several hundred acres of property in Clackamas County that was designated rural reserve in the original reserves decision ("Property"). As explained in the record, the Property is described as follows:

"The Property is located in the French Prairie area south and east of the City of Wilsonville in Clackamas County. The Property is generally located south of the Willamette River, east of I-5, and west of Airport Road in Clackamas County. It is within the immediate area of the Aurora State Airport and short and main line railways. The Property is generally flat, but it does not lie within any floodplains. Moreover, the Property does not include any important natural landscape features, such as plant or wildlife habitat or other features that define and distinguish the region. As a result, the Property is generally unconstrained and buildable.

"After completing a comprehensive analysis of the Property and its suitability for urban or rural purposes, Clackamas County staff rated the Property as having 'medium' or 'high' suitability for an urban reserve designation on all factors, with the exception of three subfactors.

“Notwithstanding these ratings and additional evidence in support of an urban reserve designation offered by the Owners into the record, Clackamas County recommended that the Property be designated as a rural reserve. Metro and the Counties incorporated the rural reserve designation into the original reserves designation.”

Letter from S. Pfeiffer to DLCD dated June 2, 2011. The designation of the Property as a rural reserve is also the subject of a separate federal lawsuit.

**IV. Argument: LCDC Must Remand the Entire Submittal to Metro and the Counties.**

The Court ordered LCDC to remand the “entire submittal.” Further, by their nature, the remand issues require additional evidence-gathering, and LCDC lacks the authority to complete this task in its role as a review body. Additionally, resolution of the remand issues may require re-mapping reserve lands, another task LCDC lacks the authority to complete. Finally, the adoption of HB 4078 does not change these conclusions. Therefore, LCDC should remand the “entire submittal” to Metro and the Counties to reconsider and re-adopt reserves.

**A. The Court of Appeals’ Order Expressly Requires that LCDC Remand the Matter.**

First, LCDC must remand the reserves matter because the Court ordered this relief, and LCDC lacks the authority to disobey the Court’s order. An administrative agency has authority on remand to act in accordance with its

powers, unless a court instructs otherwise. *Gearhart v. Public Utility Commission of Oregon*, 255 Or App 58 (2013), *rev allowed* 354 Or 386, 314 P3d 964 (2013).

In the present case, the Court expressly directed LCDC to remand the reserves matter to Metro and the Counties. For example, after concluding that LCDC erred in approving Washington County's erroneous application of the rural reserves factors, the Court ordered LCDC to remand the Washington County reserves designation as a whole for reconsideration. *Barkers Five, LLC*, 261 Or App at 333. But, the Court did not stop there. The Court further ordered LCDC to remand the entire submittal to Metro and the Counties to determine whether, after Washington County re-designated its reserves, the entire submittal properly balanced regional planning objectives:

“\* \* \* [I]t follows that, because the best achieves standard applies to Metro and the counties' joint designation 'in its entirety,' LCDC must remand the entire submittal to Metro and the counties so they can ultimately assess whether any new joint designation, in its entirety, satisfies that standard.”

*Id.* (Emphasis supplied.) Based upon this direction from the Court, in accordance with *Gearhart*, LCDC must remand the entire submittal for further consideration.

Although other parties may contend that the Legislative Assembly's adoption of HB 4078 addressed the remand issues in Washington County, LCDC should deny these contentions. HB 4078 re-maps reserves in Washington County

and thus appears to address the first remand issue identified by the Court for Washington County. However, HB 4078 does not address the second issue identified by the Court, i.e., whether, after Washington County's redesignations, the new joint designation, in its entirety, satisfies the "best achieves" standard.<sup>1</sup> In fact, HB 4078 does not include any legislative findings or amendments that discuss or apply the "best achieves" standard. Therefore, HB 4078 did not address this issue. As a result, LCDC must remand the "entire submittal to Metro and the counties" to assess whether the new joint designation satisfies the "best achieves" standard, and if it does not, to adjust reserves boundaries accordingly.

Indeed, changed circumstances likely prompt the need for changes to reserve designations. For example, HB 4078 reduced the amount of urban reserves in Washington County by 2,000 acres, without any compensating increase in urban reserves in other locations. See DLCD staff report to LCDC dated May 8, 2014. This loss of urban reserves could mean that the submittal, "in its entirety," fails to achieve livable communities, as required by OAR 660-027-0005(2). Likewise, additional analysis by Business Oregon, Metro, the Port of

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<sup>1</sup> The "best achieves" standard is set forth in OAR 660-027-0005(2): "\* \* \* The objective of this division is a balance in the designation of urban and rural reserves that, in its entirety, best achieves livable communities, the viability and vitality of the agricultural and forest industries and protection of the important natural landscape features that define the region for its residents."

Portland, and private organizations has identified a critical shortage of large-lot industrial lands in metropolitan Portland. Modified reserves designations could address this critical economic development issue. Finally, the continued uncertainty regarding the fate of the current City of Damascus may undermine the designation of its lands for urban development.<sup>2</sup>

In conclusion, LCDC lacks the authority to determine whether, after adoption of HB 4078, the submittal, “in its entirety,” satisfies the “best achieves” standard in the first instance, and there is no evidence that the Legislature completed this task in adopting HB 4078. Accordingly, LCDC must remand the entire submittal to Metro and the Counties to complete this task, and as needed, to adjust reserves boundaries to ensure that the joint designation satisfies the “best achieves” standard.

**B. The Remand Issues Require Consideration of Additional Evidence, and LCDC is Precluded from Accepting New Evidence.**

Second, the remand issues require consideration of additional evidence, and LCDC is precluded from accepting new evidence on remand. LCDC’s authority

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<sup>2</sup> LCDC should bear in mind that the final reserves decision will affect the course and scope of regional planning, economic development, and quality of life for the Portland area for the next 50 years. The significant, long-term implications of this decision underscore the need for a current factual base to support the decision. As explained in Section IV.B, the only opportunity to develop this current factual base is through a remand to Metro and the Counties.

to review evidence is limited to the local record. ORS 197.633(3). Accordingly, LCDC cannot generally accept new evidence in the first instance.

In the present case, multiple remand issues will require consideration of new evidence. For example, the Court concluded that LCDC erred in concluding that the decision to designate the Stafford area as an urban reserve was supported by substantial evidence when the evidence in the record indicated that almost all of the transportation facilities in that area would be failing, and Metro and Clackamas County cited to no evidence to the contrary:

“Stated simply, Metro and the county’s reasoning reduces to nothing more than the proposition that the transportation system will change--and presumably improve--by 2060. However, Metro and the county do not explain, by reference to evidence in the record, why that is so. Bluntly: Metro and the county’s reasoning--which LCDC essentially adopted in resolving the substantial evidence challenge--is impermissibly speculative.”

*Barkers Five, LLC*, 261 Or App at 362. As a result, addressing this issue will likely require introducing new evidence.<sup>3</sup> Although LCDC now has the authority to affirm a local government’s decision with inadequate findings if the evidence “clearly supports” the decision, the evidentiary record on this issue does not “clearly support” the decision. Rather, as noted by the Court, it undermines it.

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<sup>3</sup> The Court of Appeals declined to address the City of West Linn’s additional contentions that the Stafford urban reserve designation was not supported by substantial evidence. *Barkers Five, LLC*, 261 Or App at 362-363. These additional contentions may also warrant further evidentiary analysis on remand.

Additionally, resolution of the Washington County and Multnomah County remand issues also likely require consideration of additional evidence. Therefore, LCDC must remand the entire submittal to allow Metro and the Counties to, as needed, take new evidence to address the remand issues.

**C. Resolution of the Remand Issues May Require Remapping Reserves, a Task that Only Metro and the Counties Have the Authority to Complete.**

LCDC should also remand the entire submittal to Metro and the Counties because the Court's order likely requires modifying and applying reserves designations, a task LCDC lacks the authority to complete. Under Oregon law, only Metro and the Counties have the authority to designate reserves. *See, e.g.,* ORS 195.141 (authorizing a county and metropolitan service district to jointly designate reserves); OAR 660-027-0020 (authorizing Metro and counties to designate reserves). LCDC's role is limited to acting as a review body "[a]fter designation of urban and rural reserves." OAR 660-027-0080(2). Thus, LCDC lacks the authority to designate, undesignate, or re-designate reserves.

In the present case, resolution of the remand issues may require modifying or applying reserves designations. For example, the Court remanded the order because LCDC erred in concluding that Multnomah County's "consideration" of the rural reserve factors for Area 9D was legally sufficient. *Barkers Five, LLC*, 261

Or App at 364. To address this issue, the Court ordered a determination of how Multnomah County's error affected "the designations of reserves in Multnomah County in its entirety." *Id.* In short, resolution of this issue will require consideration of, and possible changes to, reserve designations across Multnomah County. Likewise, as explained in Section IV.A above, consideration of whether the reserves designations, as amended by HB 4078, "best achieves" regional planning objectives may require changes to reserve designations.

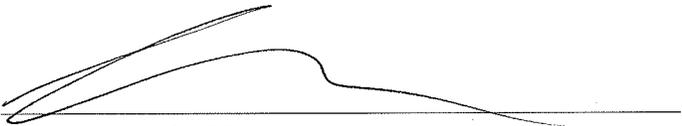
Finally, as explained in Section IV.B. above, reconsideration of reserves designations in the Stafford area may require modifications to reserve designations, either in Stafford or in other locations in order to compensate for changes in Stafford. Because LCDC lacks the authority to designate reserves, LCDC must remand the entire submittal to Metro and the Counties to allow them to complete this task in order to address the Court's remand issues.

**V. Conclusion.**

For the foregoing reasons, LCDC should enter an order remanding the reserves matter in its entirety to Metro and the Counties to address the remand issues identified by the Court of Appeals in the first instance.

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